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December 4, 2018

Roxanne Rothschild
Associate Executive Secretary
National Labor Relations Board
1015 Half Street, S.E.
Washington, D.C. 20570-0001

RE: RIN 3142-AA13; Notice of Proposed Rulemaking (NPRM), The Standard for Determining Joint-Employer Status

Dear Ms. Rothschild:

The American Staffing Association (ASA) is a national trade association comprised of member staffing firms that recruit, screen, and hire employees and place them on temporary and contract assignments with clients on an as-needed basis. ASA submits the following comments regarding the above-referenced NPRM.

Staffing is one of America's largest service industries, employing more than 15 million temporary and contract employees annually. Staffing firms play a vital role in the U.S. economy by providing employment flexibility for workers and just-in-time labor for businesses. They provide workers with jobs, training, choice of assignments and work, flexibility, and a bridge to permanent employment for those who are just starting out, changing jobs, or out of work. Temporary and contract employees work in virtually every job category, including industrial labor, office support, health care, engineering, science and information technology, and various professional and managerial positions.

Summary of Comments

On August 27, 2015, the National Labor Relations Board (Board) abandoned over thirty years of legal precedent to adopt a new legal standard for determining joint employer status. The standard adopted in *Browning-Ferris Industries of California*, 362 NLRB No. 186 (2015), is contrary to controlling caselaw and congressional intent, has resulted in legal and collective bargaining uncertainty, and has harmed staffing firms and their relationships with clients. This caselaw and congressional intent requires reversion to the prior well-established legal standard—substantial direct and immediate control over the essential employment terms and conditions of another entity's workers. Hence, we strongly support a return to the historical standard as reflected in the NPRM. We would, however, urge the Board to modify the examples of joint employment to make clear that control over only one essential condition of employment is insufficient to establish joint employment.

The Browning-Ferris Legal Standard is Contrary to Controlling Law and Congressional Intent

In *Browning-Ferris*, the Board abandoned the joint employer legal standard established more than 30 years earlier in *TLI, Inc*., 271 NLRB 798 (1984), and *Laerco Transportation*, 269 NLRB 324 (1984), which required a showing that the employers jointly exerted *direct and immediate control* over the essential terms and conditions of employment in matters such as hiring, firing, discipline, supervision, and direction of employees. In its place, the Board adopted a much more expansive economic realities standard under which *indirect control* or even an *unexercised potential right to control* employment terms can establish joint employer status.

The Board's adoption of such an expansive standard not only departed from established caselaw, but also contravened Taft-Hartley, which Congress passed in 1947 after the Board and U.S. Supreme Court sought to apply an economic realities joint employment standard rather than a common law agency, or right-of-control, legal standard. In passing Taft-Hartley, upon which *TLI* and *Laerco* are grounded, Congress expressed its unequivocal intent that direct and immediate control be the basis for determining a joint employer relationship.

Since Taft-Hartley, the Supreme Court has repeatedly held that common law agency principles must be utilized in determining employee status, and by extension, employer status. *See NLRB v. Town & Country, Inc.*, 516 U.S. 85 (1995). Moreover, the Board itself has acknowledged that its interpretation of the National Labor Relations Act is restricted to the common law agency standard. For example, in *Roadway Package System, Inc*., 326 NLRB 842 (1998), the Board noted that Supreme Court decisions "teach us not only that the common law of agency is the standard to measure employee status *but also that we have no authority to change it.*" (emphasis supplied) Nevertheless, by adopting an economic realities standard, that is exactly what the *Browning-Ferris* Board did.

As stated in the NPRM, such departure from established law reflected a belief by some members of the Board that it is wise to include in the collective bargaining process a business partner that *may* have an *indirect* impact on the essential terms and conditions of another entity's workers, even if the business partner had no role in establishing or collaborating with respect to those essential terms. Not only has that belief proven to be unwise given the resulting labor relations instability, but such policy views cannot in any event override the clear and unambiguous expression of Congressional intent and the Supreme Court's similarly clear interpretations of the governing statutes.

Browning-Ferris Has Resulted in Labor Relations Uncertainty and Instability, and has Harmed Staffing Firms' Relationship with Clients

Prior to *Browning-Ferris*, the Board's decisions provided a stable and well-developed framework within which parties could structure their relationships. Staffing firm clients knew that if they directed and controlled essential terms and conditions of temporary workers' employment, such as the right to hire and fire, set work hours, and supervise the workers, they would be a joint employer of the staffing firm's employees. *See Browning-Ferris Industries of Pennsylvania*, 691 F. 2d 1117 (3d Cir. 1982). Thus, the predictability of the well-established common law agency standard permitted staffing firms and clients to understand the consequences of their business decisions, develop plans consistent with

how they needed and wanted to operate, and manage those operations in concert with their business needs.

In contrast, *Browning-Ferris*' economic realities/indirect control standard has made it exceedingly difficult for companies to determine whether they might be deemed a joint employer, especially since the Board's regional directors have broad discretion to make such determinations. The uncertainty arises because indirect control is an undefined nebulous term that has left staffing clients guessing at its meaning and parameters. Indeed, the economic realities standard requires a lengthy, fact-intensive, and subjective inquiry not only into the relationship between the two putative joint employers and the employees, but also the relationship between the so-called employers and whatever rights to indirect control they may have reserved to themselves. Rather than permitting employees to expeditiously decide whether or not to be represented by a labor organization, the *Browning-Ferris* legal standard requires hearing officers, regional directors, and the Board to examine in detail many complex factors.

Moreover, the *Browning-Ferris* standard has led to confusion among businesses over which terms and conditions of employment they must bargain if they are deemed joint employers. Such businesses also may have diverse or conflicting interests, further contributing to fractious negotiations and labor instability.

The confusion resulting from the economic realities/indirect control standard has caused some companies to rethink using staffing firms' services, thus hurting workers and the economy.[1] This harm, as well as uncertainty stemming from recent procedural history in *Browning-Ferris*[2] and other relevant Board cases, begs for resolution through the finalization of rules adopting the pre-*Browning-Ferris* joint employer legal standard.

The Examples Should Make Clear that Control Over Only One Essential Condition of Employment is Insufficient to Establish Joint Employer Status

Several examples in the NPRM suggest that exercising control over only one condition of employment will be enough to establish joint employment. For example, example 8 states that because a hospital interviewed and selected for hire staffing firm temporary nurses, the hospital exercised control over the essential terms and conditions of the nurses' employment—suggesting that the hospital would be a joint employer based solely on involvement in the interview and selection process.

However, as the NPRM correctly points out on page 21, "it will be insufficient to establish joint employer status where the degree of a putative employer's control is too limited in scope (*perhaps affecting a single essential working condition* and/or exercised rarely during the putative employer's relationship with the undisputed employer) (emphasis supplied). Thus, while the hospital in example 8

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1 See NLRB Blows Up Staffing Agency Model: Rewrites Joint-Employer Test; The NLRB May Have Killed The Staffing Agency Business; and Controversial NLRB Ruling Could End Contract Employment As We Know It.

[2] In 2017, a different Board reinstated the pre-*Browning-Ferris* legal standard, but that decision was later vacated. A petition for review challenging Browning-Ferris' adoption of the indirect control legal standard is pending before the United States Court for the District of Columbia Circuit.

may be a joint employer if it also supervised the nurses on a daily basis (which would be appropriate), it would not be a joint employer solely due its role in the hiring process.

Similarly, example 11 includes several factual premises, but then seemingly relies on one factor—Company's suggestion that Contractor discipline its employees—to find that Company exercised control over essential terms and conditions of employment. In so doing, this example not only improperly relies upon a single condition of employment, it also contradicts the requirement of *direct* control under the pre-*Browning-Ferris* legal standard.

Examples 8 and 11, therefore, should be modified accordingly.

Thank you for your consideration.

Very truly yours,

AMERICAN STAFFING ASSOCIATION

Stephen C. Dwyer
General Counsel